

PAWNEE TRIBE OF OKLAHOMA
v.
ANADARKO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 90-105-A

Decided May 21, 1991

Appeal from a finding of ineligibility for a Core Management grant.

Referred to the Assistant Secretary - Indian Affairs.

1. Board of Indian Appeals: Jurisdiction--Indians: Financial Matters:
Financial Assistance

A Bureau of Indian Affairs decision concerning the eligibility of a tribe for a Core Management grant under 25 CFR 278.22(a)(1) is a decision based on a legal conclusion and is subject to review by the Board of Indian Appeals.

2. Indians: Financial Matters: Financial Assistance

For purposes of eligibility for a Core Management grant under 25 CFR 278.22(a)(1), a tribe's population includes members of the tribe who reside on or near the tribe's reservation, and may include as well non-member Indians who receive services from the tribe or who are socially or culturally affiliated with the tribe, but does not include non-member Indians who have no affiliation with the tribe.

APPEARANCES: Robert L. Chapman, President, Pawnee Business Council, and Gregory H. Bigler, Esq., Cushing, Oklahoma, for appellant.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Pawnee Tribe of Oklahoma seeks review of a May 9, 1990, decision of the Anadarko Area Director, Bureau of Indian Affairs (Area Director; BIA), finding appellant ineligible to receive a Core Management grant for FY 1990. For the reasons discussed below, the Board refers this matter to the Assistant Secretary - Indian Affairs.

Background

Core Management grants to small tribes are governed by the regulations in 25 CFR Part 278, Subpart C. Under this subpart, in order to

be eligible for a grant, "a tribe must have a population of at least 400 and not more than 1500 Indian people living on or near the reservation." 25 CFR 278.22(a)(1).

Appellant received Core Management grants in FY 1987 and FY 1988. It applied again in FY 1989 but was found ineligible because it exceeded the population maximum of 1,500. In determining appellant's population, the Area Director relied on a June 3, 1988, Report on Service Population and Labor Force (Service Population Report), prepared by BIA, which indicated that appellant's population within or adjacent to its former reservation was 2,229. Appellant appealed the Area Director's decision to the Assistant Secretary - Indian Affairs. ^{1/} On April 11, 1989, the Assistant Secretary affirmed the Area Director's decision, stating:

The Area Director denied the grant because the tribe is ineligible according to program regulations in Part 278 of the 25 CFR which defines a small tribe as one having a population of 1,500 or less on or near an applicant tribe's reservation. The tribe maintains it has a population under 1,500 and contends it is eligible for the program.

The Anadarko Area Office's position is that the tribe uses a population exceeding 2,000 for other of its grant and contract programs. Further, the tribe apparently accepts, or at least does not dispute, the population figure for the tribe as contained in the Indian Service and Labor Force Estimates for 1989. The tribe's population according to this publication is 2,147. [^{2/}]

Therefore, the decision of the Anadarko Area Director to deny [appellant] a Core Management grant is hereby upheld. This decision is final for the Department based on the authority provided me under Section 2.19 of the 25 CFR [1988].

On March 9, 1990, appellant applied for a Core Management grant for FY 1990, stating that its population residing on or near its former reservation was 934. Appellant's application attached a document entitled "Age Distribution," dated January 8, 1990, which appears to be a BIA-generated document. It shows appellant's total members as: On-reservation - 850, "adj-reservation" - 84, and off-reservation - 1,530.

^{1/} The Area Director's Feb. 9, 1989, decision predated the Mar. 13, 1989, effective date of the present BIA appeal regulations, under which Area Directors' decisions are appealable to this Board. See 54 FR 6478 (Feb. 10, 1989).

^{2/} The population figure given here appears to be in error. As far as the record shows, the latest Service Population Report is the June 3, 1988, report showing a resident population of 2,229. According to the Area Director's Feb. 9, 1989, decision, a 1986 report showed a resident population of 2,147.

On May 9, 1990, the Area Director found appellant ineligible, stating:

The last Bureau of Indian Affairs Report on Service Population and Labor Force dated January, 1989, [3/] gives a total tribal population within or adjacent to the tribe's former reservation of 2229. Based on this information, [appellant] is ineligible for a Core grant. We have also reviewed the tribe's FY-90 ATTG [Aid to Tribal Government] contract and found that it showed 2426 resident members within the tribe's areas. In the FY-90 CORE applications the tribe describes adjustments it had made and submitted tribal enrollment information as documentation. In the light of the population shown by the tribe in its ATTG contract, we cannot accept the enrollment figures for the CORE application.

Appellant's appeal from this decision was received by the Board on June 11, 1990. Only appellant filed briefs.

Discussion and Conclusions

In Lower Elwha Tribe v. Portland Area Director, 18 IBIA 50, 51 (1989), the Board discussed its role in reviewing BIA decisions concerning whether a particular Core Management grant application should be funded. These decisions, the Board held, are committed to the discretion of BIA. The Board stated: "In reviewing such decisions it is not the Board's function to substitute its judgment for that of BIA. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion."

[1] This case involves a "legal prerequisite" to the exercise of discretion, that is, the determination of appellant's eligibility for a Core Management grant under the regulations in 25 CFR Part 278. The Board finds that the Area Director's conclusion concerning appellant's eligibility is a legal conclusion subject to Board review.

Appellant contends that the Area Director erred in relying upon the Service Population Report and appellant's ATTG contract because the population figure in the Service Population Report is inaccurate and the population figure in the ATTG contract is irrelevant to appellant's Core Management grant application. As relief, appellant requests that:

1. The denial by the [BIA]/Anadarko Area Office of the Core Management grant application from [appellant] be overturned;
2. The Core Management grant application from [appellant] be funded in full for a total amount of \$25,435;

3/ No Service Population Report of this date is included in the record. However, the June 3, 1988, report shows the same service population.

3. [BIA] be directed to establish and adopt a consistent and reasonable definition of the phrase "on or near the reservation" for use in determining eligibility for the Core Management Program and other programs of the BIA using this population criteria as a determinant for eligibility, and that comments from the Tribes be solicited as part of this process; and,

4. [BIA] be directed to cease and desist from the practice of using the rules, regulations and requirements of one program to determine the eligibility of a Tribe for another.

(Appellant's Notice of Appeal at 5). Appellant states that it requested and received from BIA a computer print-out of all Pawnee Indians in Oklahoma. It further states that it determined from the print-out that 706 Pawnees live in Pawnee County and 499 Pawnees live in counties adjacent to Pawnee County, *i.e.*, Creek, Noble, Osage, Tulsa, and Payne Counties, for a total of 1,206. Further, appellant states, 19 and 55 Pawnees live in Washington and Kay Counties, respectively, so that an eight-county total Pawnee population is 1,279 (Notice of Appeal at 2-3).

In its reply brief, appellant alleges that only one of the sources upon which BIA relied to compile the Service Population Report, *i.e.*, a May 25, 1988, Age Distribution Report, specifically identifies individuals as Pawnee. Appellant contends, based on these documents, that the Service Population Report includes all Indian individuals in the geographic area, not just Pawnee tribal members.

[2] Before addressing this argument, the Board must first address an ambiguity in the Core Management regulations. As noted above, the regulations state that in order to be eligible for a grant, "a tribe must have a population of at least 400 and not more than 1500 Indian people living on or near the reservation." 25 CFR 278.22(a)(1). The regulation does not specifically state that the Indian individuals to be counted are the members of the applicant tribe. The term "Indian" is defined in the regulations as "a person who is a member of an Indian tribe." 25 CFR 278.2(k). Thus, conceivably, as relevant to a particular tribe, the term "Indian people" might include members of other tribes who happen to reside on or near the tribe's reservation. The preamble to the Federal Register publication of the regulations is not particularly helpful in resolving this ambiguity. It does, however, refer at one point to "[t]ribes of this size (*i.e.*, 1,500 or less)," implying that only tribal members are to be counted. 48 FR 32006, 32007 (July 13, 1983).

Despite this ambiguity of language, however, the regulations make clear that Core Management grants are to be awarded for purposes pertaining to improvement of tribal administrative capabilities and delivery of services. 4/ These purposes would appear to have little relevance to

4/ 25 CFR 278.21(a) provides:

"Purposes of grants under this subpart are:

Indian individuals who happen to live on or near a tribe's reservation but who have no connection with the tribe. Accordingly, it appears most likely that only members of the applicant tribe are intended to be included in the count, with the possible addition of non-member Indians who receive services from the tribe or have social or cultural affiliations with the tribe, and who would therefore benefit from improved tribal administrative and service capabilities. The Board concludes that tribal "population" for purposes of the Core Management grant regulations means members of the tribe and those non-member Indians with service, social, or cultural ties to the tribe.

The Board returns to appellant's challenge to the Service Population Report. This report is identified, in an uncaptioned block at the top of the form, with the designation "Pawnee," presumably intended to refer to appellant. 5/ In the block for "County(ies)," "Pawnee and N. Payne Count[ies]" are entered. The report continues, in relevant part:

		TOTAL
A	Total Resident Indian Population (b & c EXCLUDING d)	2229
bc	Within the reservation.....	_____
	Adjacent to the reservation (in Okla., Indians in former reservation areas)	2229
d	Other Indians, not included in lines b & c above * * * * *	
Z	Tribal enrollment	2403

It is not clear from the form itself whether category A is intended to be limited to Pawnee tribal members. The tribal enrollment figure in category Z, however, presumably includes only Pawnee tribal members. This figure is similar to appellant's 1989 enrollment of 2,426.

fn. 4 (continued)

“(1) To supplement the resources of small tribes in order to permit them to address basic or core tribal management needs such as an administrator, bookkeeper and clerical support.

“(2) Through such assistance, enable small tribes to overcome problems associated with governmental operations and the administration of tribal and Federal programs, with particular emphasis being placed on financial accountability.

“(3) Contribute to the stability of tribal governments and set a climate for community and economic development and other activity designed to reduce tribal dependency and promote small tribes exercise of self-determination.”

5/ None of the copies of the Service Population Report included in the record show any caption for the block in which the word “Pawnee” appears. Since the block immediately below is captioned “County(ies)” the Board assumes that “Pawnee” in the top block is intended to refer to the Pawnee Tribe and not Pawnee County.

The documents used by BIA to compile the report are, as appellant contends, for the most part not broken down by tribal affiliation. The only document which is clearly limited to Pawnee members is the May 25, 1988, Age Distribution Report, which shows a total of 916 Pawnees located on or adjacent to the reservation. 6/

It appears likely therefore that the Service Population Report is an estimate of all Indian residents of Pawnee and northern Payne Counties, rather than only Pawnee residents. This conclusion is bolstered by the fact that the 1988 Age Distribution Report shows that 1,487 Pawnees were counted as residing "off-reservation," i.e., neither on nor adjacent to the reservation. If this "off-reservation" total is added to the total "on or adjacent to the reservation" figure of 2,229 in the Service Population Report, the sum far exceeds the total 1988 tribal enrollment of 2,403. 7/

Since the Service Population Report apparently includes all Indian residents of the area, the Board concludes that it was inappropriate for BIA to use the figure from that report to determine appellant's "on or near reservation" population for purposes of the Core Management grant program.

It is not entirely clear, however, what source should be used. Appellant does not contend that the necessary information could or should be extracted from its own membership data. Rather, it apparently is willing to rely on BIA-generated data. As noted above, BIA furnished appellant with a computer print-out of the names and addresses of Pawnees living in Oklahoma. From the materials before the Board, however, it cannot be ascertained what BIA records were used to produce this print-out or whether the information is complete. 8/ It is possible that the Age Distribution Report would be an appropriate source, because it is specifically limited to Pawnee tribal members; the Board is unfamiliar with this report and lacks information concerning the accuracy of the data included in it.

6/ The Service Population Report states at page 2:

"Sources of data utilized were: U.S. Census Bureau Estimated Indian Service Population by State and County; U.S. Census Bureau General Social Economic Characteristics for Oklahoma Table 171; U.S. Census Bureau Subject Reports Issued November 1985; Oklahoma Population Report Special Study Percentage by race and Percentage by Age July 1, 1985; B.I.A. Age Distribution Report for the Pawnee Tribe. The 1987 Indian Service Population and Labor Force Estimates Report was used as a reference in updating the required data. A 2% increase by year was projected. All sources of data were considered in the estimated figure."

The report shows that the Superintendent evaluated the data as "reasonably accurate."
7/ It is possible, of course, that the "on or adjacent to reservation" designations refer to different geographic areas in the two reports.

8/ For instance, if the records are maintained for realty purposes, they presumably include only those Pawnees owning interests in trust property, rather than all Pawnee tribal members.

A further problem in determining appellant's "on or near reservation" population is identifying the appropriate geographic area. The Core Management regulations do not define either "reservation" or "near reservation." BIA regulations for some other programs define "reservation" to include former Indian reservations in Oklahoma. E.g., 25 CFR 20.1(v) (financial assistance and social services); 25 CFR 101.1(h) (loans); 25 CFR 103.1(h) (loan guaranty); 25 CFR 151.2(f) (trust land acquisitions); 25 CFR 286.1(j) (Indian Business Development Program). In other BIA program regulations, however, the definitions of "reservation" do not specifically include former Oklahoma reservations and probably could not be construed to include them. E.g., 25 CFR 26.1(j) (employment assistance); 25 CFR 27.1(1) (vocational training). Since BIA does not have a completely consistent interpretation of the term "reservation" as it applies to Oklahoma, it appears that appellant's reservation for purposes of the Core Management grant program might be either its presently recognized reservation, i.e., the Pawnee Tribal Reserve, or its entire former reservation.

The term "near reservation" is also defined in some other BIA program regulations. For purposes of 25 CFR Part 20, Financial Assistance and Social Services Program, it is defined as

those areas or communities adjacent or contiguous to reservations which are designated by the Commissioner [of Indian Affairs] upon recommendation of the local Bureau Superintendent, which recommendation shall be based upon consultation with the tribal governing body of those reservations, as locales appropriate for the extension of financial assistance and/or social services, on the basis of such general criteria as: (1) Number of Indian people native to the reservation residing in the area, (2) a written designation by the tribal governing body that members of their tribe and family members who are Indian residing in the area, are socially, culturally and economically affiliated with their tribe and reservation, (3) geographical proximity of the area to the reservation, and (4) administrative feasibility of providing an adequate level of services to the area. The Commissioner shall designate each area and publish the designations in the FEDERAL REGISTER.

20 CFR 20.1(r). 9/ The "near reservation" designation for appellant was published in the Federal Register on March 9, 1979, 44 FR 13084. The area as described appears to include Grant, Garfield, Kay, and Noble Counties, as well as parts of Kingfisher, Logan, and Payne Counties. It does not appear to include Pawnee County. 10/ This is clearly a

9/ BIA regulations governing employment assistance and vocational training contain similar definitions. 25 CFR 26.1(i); 25 CFR 27.1(k).

10/ The Board's attempts to plot the described area on a map were only partially successful. It appears from the materials available to the Board that part but not all of Pawnee County is within the former Pawnee Reservation.

different geographic area than that analyzed by appellant for purposes of this appeal. It is also a different geographic area than that covered by the Service Population Report.

While the published "near reservation" designation was prepared for purposes of financial assistance and social services rather than the Core Management grant program, the criteria used to arrive at the designation are also relevant to the current inquiry. Further, appellant presumably participated in the designation, as required by the regulation. Therefore, the Board finds that appellant's "near reservation" area, as published in the Federal Register, is an appropriate geographic area for purpose of the Core Management grant program. If this area is considered appellant's "near reservation" area, the former Pawnee Reservation should probably be considered appellant's reservation, in accordance with the definition of "reservation" for purposes of 25 CFR Part 20.

The Board does not hold, however, that these areas are the only geographic areas appropriately considered as appellant's "reservation" and "near reservation" areas for purposes of the Core Management grant program. ^{11/} Because there are no definitions of these terms in the Core Management grant regulations, an interpretation of the regulation must be made. This interpretation should be made, however, with more information than is presently before the Board. It is apparent that appellant has collected relevant information in connection with this appeal. BIA has not yet had an opportunity to review this information. In further proceedings, as discussed below, the Assistant Secretary - Indian Affairs is requested to take appellant's information into account, as well as any established practice concerning interpretation of the term "reservation" for purposes of Core Management grants to Oklahoma tribes, in arriving at an appropriate designation of geographic area to be considered appellant's "on or near reservation" area for purposes of the Core Management grant program.

Appellant also contends that it was error for BIA to equate appellant's population for purposes of Core Management grant eligibility with its service population under its ATTG contract. Appellant's FY 1989 ATTG contract application states that the number benefitting from the contract would be "2426 Enrolled Pawnee Tribal Members." Appellant argues that it was appropriate to include its total membership in its ATTG contract application because work under the contract includes matters which are of concern to all members, regardless of residence.

^{11/} The Board recognizes that the Anadarko and Muskogee Area Offices, during the course of the Core Management grant program, may have arrived at an interpretation of the term "reservation" for Oklahoma tribes. If they have, that interpretation should be applied in appellant's case. Since this is a competitive program, all competing tribes should be considered under the same basic definitions.

The Board agrees that, judged by appellant's August 30, 1989, ATTG contract application, performance under the contract would benefit all tribal members. Thus it appears appropriate for appellant to include its entire membership in its ATTG contract application, even though not all members reside on or near the reservation. Of course, performance under a Core Management grant would presumably also benefit all tribal members, regardless of residence. However, the regulations are specific in basing threshold eligibility, not upon total tribal membership, but upon population "on or near the reservation." The Board finds that it was inappropriate to require appellant's "on or near reservation" Core Management population to match its ATTG contract service population.

Several problems remain concerning the appropriate disposition of this appeal. Appellant seeks as relief, inter alia, full funding for its FY 1990 Core Management grant application. However, FY 1990 Core Management funds are no longer available. Further, even if funds were available and the Area Director were to determine that appellant meets threshold eligibility requirements, appellant would not automatically be entitled to receive a grant; rather, its application would have to compete with those of other tribes for the limited funds available.

Moreover, the Board recognizes that the Assistant Secretary's 1989 decision reached a different conclusion than the Board reaches here concerning the propriety of equating the Service Population Report figure and/or population figures from appellant's "other * * * grant and contract programs" with appellant's "on or near reservation" population for Core Management purposes. The Board normally affords comity to decisions of the Assistant Secretary. E.g., Kiowa Business Committee v. Anadarko Area Director, 14 IBIA 196 (1986); Willie v. Commissioner of Indian Affairs, 10 IBIA 135 (1982).

By notice published in the Federal Register on January 31, 1991, 56 FR 3958, BIA announced that grants under a Small Tribes Grant Program for FY 1991 will be awarded through the BIA Central Office in Washington, D.C., rather than by the Area offices. 12/ Accordingly, inasmuch as any administrative relief available to appellant is, as a practical matter, prospective only, the Board will refer this matter to the Assistant Secretary - Indian Affairs, for consideration during the FY 1991 grant application review process. 13/ The Board recommends that the Assistant Secretary reconsider his 1989 decision, in accordance with the discussion in this decision, in determining appellant's eligibility for a FY 1991 grant.

12/ Although not termed Core Management grants, these grants appear to be virtually identical to Core Management grants under 25 CFR Part 278.

13/ The Board assumes, but does not know, that appellant has applied for a FY 1991 grant.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this matter is referred to the Assistant Secretary - Indian Affairs.

Anita Vogt
Administrative Judge

I concur:

Kathryn A. Lynn
Chief Administrative Judge